UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

TOTAL FIRE PROTECTION, INCORPORATED Employer and ROAD SPRINKLER FITTERS LOCAL 669 Petitioner	Case 18-RC-17707

DECISION AND DIRECTION OF ELECTION

As described in more detail below, the Employer fabricates, delivers and installs custom-made sprinkler systems. Petitioner seeks to represent a unit of all full-time and regular part-time journeymen, apprentices, and helper sprinkler fitters who install, maintain and service sprinkler systems out of the Employer's Brandon, South Dakota facility; excluding shop employees, designers, delivery personnel, office clerical employees, other represented craft employees, guards and supervisors as defined in the Act. Contrary to Petitioner, the Employer maintains that shop employees should be included in any appropriate unit. In addition, the parties disagree on whether laid-off employees are eligible to vote. Finally, the Employer insists that the election be conducted at its Brandon facility, while the Union insists that the election be conducted by mail.

Based on the record and relevant Board law, I reject the Employer's position that the unit must include shop employees. However, I also reject Petitioner's position that laid-off employees should be eligible to vote.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition, and the parties do not contend that there is a contract bar to this proceeding.

In this decision, I first provide an overview of the Employer's facilities and operation and of the managerial and supervisory hierarchy. Next, I describe the work and qualifications of the employees sought by Petitioner. Third, I describe the Employer's Brandon operation, including the shop employees the Employer seeks to

[1] The hearing officer declined to take any testimony on the question of whether a manual or mail-ballot election should be held.

[2] The Employer, Total Fire Protection, Incorporated, is a South Dakota corporation engaged in the installation, fabricating and maintenance of new and existing fire sprinkler systems. During the past year, the Employer sold goods and services valued in excess of $50,000 directly to customers located outside the State of South Dakota, and the Employer's gross revenues exceeded $500,000.

include in the unit. Fourth, I compare the wages and benefits of the employees in the unit sought by Petitioner with the wages and benefits of the shop employees. I then describe the limited record testimony regarding laid-off employees. Finally, I explain my conclusions that the unit sought by Petitioner is an appropriate unit for collective-bargaining purposes and that laid-off employees are not eligible to vote.

Overview of the Employer's Facilities, Operation and Supervisory Hierarchy

The Employer operates in and out of a facility located in Brandon, South Dakota. While not included in the record, I note that Brandon is located within a few miles of Sioux Falls, South Dakota, and therefore is only 20 to 25 miles from the Minnesota state border. The Employer's owner and president is Richard Brandt, who started the company in 1985. The Employer employs a total of 88 to 90 employees. Between 50 and 56 of those employees are in the unit sought by Petitioner, and 8 to 9 employees work in the shop.

The Employer fabricates, delivers and installs sprinkler systems. What makes the Employer's business unique from others in the industry is the fact that it fabricates pipe for its jobs. In order to fabricate the pipe, seven engineers in the employ of the Employer design the pipe. It is then fabricated in the Employer's shop, loaded onto a trailer and conveyed to worksites by a driver employed by the Employer, and finally it is installed by employees sought by the petition. The Employer has worked with customers located in Arizona, as well as near the border of Canada; and the Employer is licensed in 17 states. However, recently the Employer has focused its operation on an area within 300 to 400 miles of Sioux Falls. Currently, the Employer's project that is

farthest from Sioux Falls is in Cody, Wyoming. Other current jobs are in Sioux Falls and Brookings—both located in South Dakota—and in central Iowa.

At the hearing Employer witnesses took great pains to avoid suggesting that it installed sprinkler systems at new construction sites. However, the record is clear, based on testimony from Petitioner witnesses, that either all or almost all of the Employer's current work is at construction sites where new buildings are being erected. In addition, however, the Employer also retrofits existing buildings to either install or upgrade sprinkler systems, and the Employer performs repair and maintenance work on systems it installs.

President and owner Richard Brandt oversees the entire operation. Other managers/supervisors include Scott Hansen, responsible for operations in the field; Allen Severson, responsible for the operation of the shop; John Swenson and Brent Fisher, who oversee engineering and design work; Susan Johnson, who supervises the office staff; and Tom Schnetter, who is the Employer's safety director. While the record contains little evidence regarding the responsibilities of each manager/supervisor, it is clear that Scott Hansen oversees all operations in the field, including determining how many employees are assigned to each project. Furthermore, Hansen does not supervise the shop employees, unless they happen to be working in the field.

Employed at each site in the field is a foreman. Foremen (unlike other field employees) are provided cell phones and trucks by the Employer. It does not appear that either party contends that foremen are supervisors within the meaning of Section 2(11) of the Act.

Work and Qualifications of Employees in the Unit Sought by Petitioner

The employees sought by Petitioner do not work at the Employer's Brandon facility on a regular basis. Rather, they work in the field, installing sprinkler systems. They work in crews. In the past, on some large retail store projects, six to eight employees in the unit sought by Petitioner would work together. More recently, as the Employer has sought smaller projects, typical crew size is two employees. The record is clear that these employees do not report to the Employer's shop on a daily basis. On the contrary, most report once a week or less, although the frequency of being in the shop depends on the geographical distance between the shop and jobsite, on whether the employees in the field need additional pipes and go to the shop to get them, or whether field employees have some other reason to be at the shop.

Employees in the unit sought by Petitioner attend a four-year apprenticeship program in conjunction with the American Sprinkler Association. Owner Richard Brandt serves on a committee that determines whether employees who are in the program meet the skill level for each step in the program. Shop employees do not attend this apprenticeship program, although they have their welding certification tests to pass.

Employees in the unit sought by Petitioner provide many of their own tools, in part because this ensures that the tools are cared for by the employees. Included in the list of tools field employees provide are channel locks, pipe wrenches, tape measures, torpedo levels, sockets, hammers and tool pouches. On the other hand, shop employees are not required to provide as many tools, other than the "day-to-day tools" they use—not otherwise described by the Employer except for a tape measure.

Initial testimony by the Employer's president suggests that all employees in the unit sought by Petitioner initially start out in the shop. However, as the hearing progressed, it became clear that field employees do not first work in the shop. Rather some of them (no specifics were provided) might start out in the shop for further training. In other words, field employees are hired to work in the field—not the shop—and may start out in the shop for training.

While not entirely clear, it appears that employees in the unit sought by Petitioner must be licensed in some or all of the states they work in, and are required to take continuing education classes.

The Employer's Brandon Operation, Including the Shop

The Employer emphasizes that it utilizes a team concept. This means all employees are to think of themselves on a team, working together to satisfy customer needs. Therefore, according to the Employer, employees are trained to work together; are cross-trained; are functionally integrated; and in fact work together. However, except as noted below, the Employer failed to provide specific examples to support these generalizations.

First, there is no evidence that current employees have been cross-trained. On the contrary, the only way a shop employee could be cross-trained to work in the field would be to join the apprenticeship program. None of the current shop employees is enrolled in the apprenticeship program. However, one 70-year-old shop employee who used to work in the field now works part-time in the shop for whatever hours the employee chooses to work. Similarly, the only evidence of cross-training of employees in the unit sought by Petitioner is the general testimony that sometimes field employees

start in the shop for training purposes. However, there is no evidence that any current field employee has cross-trained in the shop. Moreover, there is no evidence establishing interchange. That is, there is no evidence that shop employees substitute for field employees or that field employees substitute for shop employees. Except for the 70-year-old shop employee, there is no evidence that shop employees transfer to field employee jobs or that field employees transfer to shop employee jobs.

With regard to functional integration, there is no question that the shop fabricates the pipes that the employees sought by Petitioner install. What generally happens is that the pipe is designed in-house, the pipe is fabricated by shop employees, the pipe is hauled to a jobsite by the truck driver, and then the pipe is installed by the field employees. However, according to the Employer, sometimes shop employees go to the jobsites to assist with installation; sometimes the truck driver assists with installation; and sometimes the field employees help out in the shop—for example, loading pipes onto the truck. None of these claims is quantified. In fact, when asked, Employer witnesses disavowed any personal knowledge of when these events occur, except that the president estimated that one named field employee spends 3 to 5 percent of his time in the shop. However, the president did not explain what that employee does while in the shop. On the other hand, there is specific evidence suggesting shop employees might go to a jobsite to measure how much pipe is needed. Presumably, this is done prior to fabrication, and therefore field employees would not yet be at the jobsite.

Wages and Benefits

All employees receive the same benefits, which are not further described in the record. Shop employees' wages range from $11 per hour to $20.42 per hour, with half

of the shop employees paid $16 per hour or less. The driver is paid $14 per hour. The wage range for the employees sought by Petitioner is from $12 per hour to $27.72 per hour. Seven of the employees in the unit sought by Petitioner are paid $14 per hour or less, while ten are paid more than $27 per hour (but less than $28 per hour).

The Status of Laid-Off Employees

The record contains very little information about laid-off employees. The importance of this issue is that Petitioner contends that because the Employer is in the construction industry, laid-off employees are eligible to vote in the election to the extent they meet the test applied in *Daniel Construction Co*., 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny & Co.*, 308 NLRB 1323 (1992). On the other hand, the Employer contends that the employees were permanently laid off with no reasonable expectation of recall.

Employer owner Brandt testified that with the downturn in the economy the Employer lost business. Thus, starting in November 2009 and continuing through the end of March 2010, the Employer began laying off employees, including about 10 field employees. According to Brandt, the Employer continues to look for ways to cut expenses, and additional layoffs are possible. Brandt also testified that he did not believe that the Employer had ever laid off employees prior to November 2009 because of lack of work. Rather, prior to November 2009, the Employer was constantly expanding. While the Employer had terminated employees for cause, it had never instituted a layoff due to lack of work until November 2009. Finally, Brandt testified that he viewed the layoffs as permanent, and Petitioner did not rebut the testimony.

A review of Employer records in evidence tends to support Brandt's testimony that the Employer has never had a layoff prior to November 2009. In this regard I note that in evidence is an exhibit showing the hire dates of all of the Employer's employees. The hire dates for the employees in the unit sought by Petitioner range from the year 1992 through January 2010, and there is no indication that any of the employees has ever been laid off.

Analysis

The Unit Sought by Petitioner Is an Appropriate Unit

The Board has long found that units may be appropriate based on craft status, or where the requested employees are a clearly identifiable and homogenous group with a community of interest separate and apart from other employees. In making unit determinations, the Board considers whether a community of interest exists by examining factors such as mutuality of interests in wages, hours and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration. *Yuengling Brewing Co. of Tampa*, 333 NLRB 892 (2001). In determining whether a petitioned-for group of employees constitutes a separate craft unit, the Board looks at whether the employees participate in a formal training or apprenticeship program; whether the work is functionally integrated with the work of the excluded employees; whether the duties of the employees overlap with the duties of employees a party seeks to exclude; whether the employer assigns work according to need rather than on craft or jurisdictional lines; and whether the employees petitioned for share common interests

with other employees, including wages, benefits, and cross-training. *Burns v. Roe*, 313 NLRB 1307, 1308 (1994).

I conclude that the unit sought by Petitioner is an appropriate unit and that the unit need not include shop employees. It is clear that the employees sought by Petitioner undergo a four-year apprenticeship program before they are designated journeymen—a clear indication of craft status. Moreover, the employees sought by Petitioner utilize unique tools in order to install pipes, while the shop employees fabricate pipes. In addition, the division of work suggests that the employees sought by Petitioner constitute a separate craft. In this regard, there is little or no overlap in the work of shop employees and the pipefitters sought by Petitioner. To the extent the Employer's general testimony that shop employees sometimes work in the field is credited, limited exceptions to a general division of labor are not fatal to a separate craft division. Id. at 1308, 1310. See also *Schaus Roofing and Mechanical Contractors, Inc*., 323 NLRB 781 (1997).

Even if I were to conclude that the employees sought by Petitioner are not craft employees, the above factors in addition to other factors support a conclusion that the employees sought by Petitioner have a community of interest separate and apart from shop employees. The employees sought by Petitioner are separately supervised and are more highly skilled than shop employees; the employees sought by Petitioner work in the field and are rarely in the shop; there is no evidence (other than general and unsupported testimony) that shop employees work in the field; and the employees sought by Petitioner perform duties and work with tools distinct from shop employees.

While there is a degree of functional integration, in that the employees sought by Petitioner install pipes that are fabricated by shop employees, this functional integration does not result in significant contact between the groups of employees. On the contrary, the employees sought by Petitioner work at jobsites, some of which are 300 to 400 miles from the Employer's facility, while shop employee work is located in the Employer's facility. Finally, while employees sought by Petitioner and shop employees share the same benefits, there is a significant disparity in wages. In this regard, I note that the lowest paid employee in the unit sought by Petitioner is paid $1 per hour more than the lowest paid shop employee, and that the highest paid employees in the unit sought by Petitioner are paid over $7 per hour more than the highest paid shop employee. *United Operations, Inc*., 338 NLRB 123 (2002).[3]

[3] In reaching the conclusion that the unit sought by Petitioner is an appropriate unit, I have not reviewed time sheets of employees in the unit, and I have not considered any arguments made by Petitioner in its post-hearing brief related to the time sheets. In this regard, I note the following. Petitioner subpoenaed numerous documents from the Employer, none of which the Employer provided at the hearing. Rather, the Employer filed with the hearing officer a motion to revoke the subpoena. The hearing officer deferred ruling on the motion until the end of the hearing. Just prior to closing the record, the hearing officer granted the motion to revoke subpoena, except that he ordered the Employer to provide Petitioner three months (13 weeks) of time sheets for employees in the unit sought by Petitioner. The hearing officer further instructed the Employer to provide the time sheets to Petitioner on or before May 27, 2010. The Employer subsequently filed a petition for special permission to appeal the hearing officer's ruling on its petition to revoke subpoena with the Board, which the Board denied on May 26, 2010. However, neither Petitioner nor the hearing officer made clear that the time sheets would be part of the record in this matter. Thus, unless I order the record reopened, the time sheets are not in evidence. I do not find it necessary to reopen the record in order to admit the time sheets in view of my conclusion that the unit sought by Petitioner is an appropriate unit—a conclusion I reached without consideration of whatever relevant information is contained in the time sheets.

Laid-Off Employees Are Not Eligible to Vote

Petitioner contends that laid-off employees should be eligible to vote to the extent they have worked sufficient hours to meet the eligibility formula set out in *Daniel/Steiny*. However, application of the *Daniel/Steiny* formula is inappropriate in this case.

The *Daniel/Steiny* formula is to be used when an employer is engaged in the building and construction industry. There is no question that the Employer meets the definition of an employer engaged in the building and construction industry. However, another element required for use of the *Daniel/Steiny* formula is that an employer's pattern of hiring includes hiring on an intermittent basis. That is, while an employer might have a core group of employees, the employer hires additional employees needed for particular jobs—some of whom are repeatedly laid off and recalled by the employer depending on its level of work. *Turner Industries Group, LLC*, 349 NLRB 428, 435 (2007). There is no evidence in this record that the Employer has a practice of hiring employees on an intermittent basis. On the contrary, it appears that the Employer has expanded its workforce as its business has expanded, and has never utilized temporary employees as pipefitters in order to meet its needs.

There is also no evidence that the employees laid off by the Employer have a reasonable expectation of recall. The only evidence in the record is the testimony of Employer President Brandt, who testified that he considered the laid-off employees to be permanently laid off, with no expectation of recall. Petitioner offered no evidence rebutting this testimony.

The Method of Election Is Not Litigable

While the hearing officer declined to take testimony on the question of whether a mail-ballot election is appropriate, both Petitioner and the Employer addressed this issue in their post-hearing briefs. The Petitioner contends that only a mail-ballot election is appropriate. The Employer opposes a mail-ballot election and contends that only an on-site election is proper. As the method of election is not a proper subject for litigation, but rather is better left to my discretion, it is unnecessary to resolve this issue at this time. *Halliburton Services*, 265 NLRB 1154 (1982); *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366 (1954).

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time journeymen, apprentices, and helper sprinkler fitters who install, maintain and service fire sprinkler systems and are employed by the Employer out of its Brandon, South Dakota facility; excluding shop employees, designers, delivery personnel, office clerical employees, guards and supervisors as defined in the Act, as amended.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, and who meet the eligibility formula set forth above. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to

vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[4]

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **Road Sprinkler Fitters Local 669.**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by 5:00 p.m.**

[4] To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, 330 South Second Avenue, Suite 790, Minneapolis, MN 55401-2221, on or before close of business **June 9, 2010**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

(EDT) on June 16, 2010. The request may be filed through E-Gov on the Board's website, www.nlrb.gov,[5] but may not be filed by facsimile.

Signed at Minneapolis, Minnesota, this 2nd day of June, 2010.

/s/ Marlin O. Osthus

Marlin O. Osthus, Regional Director
Region Eighteen
National Labor Relations Board
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[5] To file a request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-filing link on the menu. When the E-file page opens, go to the heading Board/Office of the Executive Secretary and click the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of the page, check the box next to the statement indicating that the user has read and accepts the E-File terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the "Submit Form" button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's original correspondence in this matter and is also located under "E-Gov" on the Board's website, www.nlrb.gov.